

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1071

To be argued by
BARRY BASSIS

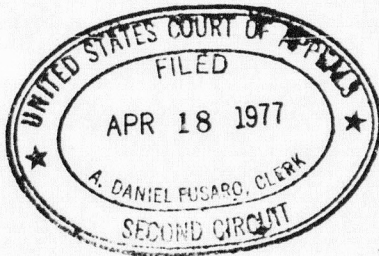
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
CHARLES DANIELS,
Defendant-Appellant.
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Docket No. 77-1071

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Whether defense counsel's failure to make pre-trial motions, to request accomplice and immunized witness instructions or to except to their omission from the charge, to object to the prosecutor's improper remark in summation, or to advocate appellant's cause at sentencing deprived appellant of the effective assistance of counsel.

2. Whether the impairment of appellant's right to present information in mitigation of punishment requires vacature of the sentence imposed and a new sentencing procedure.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable George C. Pratt) rendered on January 28, 1977, after a jury trial, convicting appellant of stealing clothing worth more than \$100 from an interstate shipment and of possessing those goods knowing they had been stolen (18 U.S.C. §659) (75 Cr. 899, Counts I and II). Appellant was sentenced to concurrent eight-year terms on the two counts, to run consecutively to a New York State sentence he was then serving.

By order of this Court dated February 17, 1977, The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On November 25, 1975, appellant was indicted (75 Cr. 899)* for stealing a quantity of women's apparel worth more than \$100 from a truck traveling from New Jersey to New York and, along

*The indictment is B to the separate appendix to appellant's brief.

with John Allen Holmes,* for possessing those goods knowing that they had been stolen (18 U.S.C. §659). The crimes allegedly occurred on April 13, 1972.

A. Pretrial Proceedings

Before jury selection had begun, the court acknowledged receipt of a pro se motion to dismiss the indictment, which asserted (among other grounds) that appellant had been prejudiced by the 3 1/2 year pre-indictment delay (T.10). The Government responded that it had not learned of appellant's participation in the robbery until 1975 (T.12-13).** After appellant had expounded his position (T.11-15), counsel remarked: "He is making a very good argument. I don't want to interrupt it" (T.16). Nevertheless, counsel noted that the Government's delay must have been intentional since appellant had previously been tried in the Eastern District,

*The Government severed Holmes's case before trial, with the intention of dismissing the indictment against him (T.28). (Numerals in parentheses preceded by "T" refer to pages of the pretrial proceedings and trial, dated October 28 and 29, 1976. "U" refers to minutes of trial, dated November 1, 1976, and "S" refers to the minutes of sentencing, dated January 28, 1977.)

**Chester Crawford, a key prosecution witness, testified at trial that the Government had informed him that he would be a witness in the instant case in late 1973 or 1974 (U.29-30).

with the same co-defendant, for a similar hijacking;* both charges apparently arose from the same investigation (T.16, 26-27).

The court ordered a conference between appellant and his attorney to determine whether a hearing was necessary on the issue of pre-indictment delay and to discuss the statement appellant desired to make in open court (T.26, 30-31). After a brief recess, counsel stated that he did not have the confidence of appellant, and asked to be relieved (T.31-32).** Appellant joined in the request, claiming an irreconcilable conflict between the two (T.33). Following the Government's objection that its witnesses were ready, the court denied the motion (T.32-35).

After the luncheon recess, appellant submitted to the court a handwritten memorandum that stated, inter alia, "Mr. Brown [defense counsel] has failed to make suppression motions which has denied me effective assistance of trial counsel" (T.96-97). Judge Pratt conducted the following inquiry:

*That trial concluded with an acquittal for Holmes and a hung jury for appellant. The indictment (75 Cr. 96) was subsequently dismissed because of a violation of the Interstate Agreement on Detainers (S.7-8). The same attorney represented appellant at both trials.

**Counsel also announced that appellant had just given him the names and addresses of two witnesses (then in prison) whom he wanted subpoenaed (T.31). Following an in camera hearing, the court denied the request (T.38-54, 63-67).

With respect to the suppression motions, I assume that Mr. Brown has analyzed that case in his point of view and no such motion was called for?

MR. BROWN: Yes.

(T.97).

Expressing the opinion that appellant was trying to postpone the trial, the court again denied the motion (T.97-98). The jury was then selected and the case proceeded to trial (T.99-104).

The Government's Case

The prosecution's case rested upon the testimony of Daniel Galvin and Chester Crawford (both of whom testified under immunity) and Thomas Ingram (the driver of the hijacked vehicle, who identified appellant as the person he had observed for about three minutes more than 4 1/2 years earlier).

Galvin had prior convictions for hijacking, forgery, possession of stolen property, and selling cocaine, and admitted his guilt of other uncharged crimes (T.190-192). He faced several more years of probation, and his probation officer knew that he was testifying (T.248-249). Chester Crawford admitted that he had a reputation as a "fence" who moved stolen merchandise on his trucks (U.32-33). He had three hijacking convictions; one of his accomplices had murdered a person during a postal truck robbery (U.13-14, 36-37). Because of his cooperation with the Government, Crawford had received concurrent

sentences of 10 and 12 1/2 years on two of the convictions, which he was still serving. He had been incarcerated for 3 1/2 years at the time of appellant's trial (U.48-49, 55). The Government had also agreed not to indict him for five other hijackings in which he had participated (U.43). The United States Attorney had also written to the Parole Board and the Department of Probation on his behalf, and had secured the admission of Crawford and his family to the witness protection program (U.45, 50-54, 58-60). Despite the foregoing, the prosecution informed the jury in summation that "[t]here is no motive of these two men [Crawford and Galvin] to lie" (U.158).*

Galvin testified that he met appellant in 1971, when they attempted a hijacking with two other men (T.193-194). During the week before the instant crime, Galvin and appellant rode around looking for a truck to hijack (T.252-253). On April 13, 1972, Galvin arrived at appellant's house at 7:00 a.m. (T.198).** The two drove around in appellant's car until they noticed a truck parked across the street from the loading bays at Gertz's Department Store in Jamaica (T.199). Appellant and Galvin, neither of whom wore a mask, approached Thomas Ingram, who was

*Counsel did not object to this remark.

**Although Galvin testified on direct examination that he and appellant had agreed the night before to hijack a truck that morning (T.198), he stated on cross-examination that he had not visited appellant the previous evening or made any plan; the crime was spontaneous (T.222-224).

seated inside the truck. Appellant, armed with a gun, ordered the driver to reset the alarm at the rear of the vehicle (Galvin, T.199-201; Ingram, U.84-86). Appellant then gave Ingram a pair of sunglasses with tape on the inside, which effectively blocked his vision for the remainder of the incident (Ingram, U.86-86; Galvin, T.201). As Galvin drove, appellant looked through Ingram's wallet and uttered several threats (Ingram, U.87-88; Galvin, T.201-202).

They drove to the house of Chester Crawford, who had not been told they were coming (Galvin, T.201-202). Crawford had in the past bought hijacked materials from appellant, and subsequently gave the latter permission to bring trucks to his garage (U.18-19, 26). After speaking to Crawford's wife, they unloaded 2/3 of the shipment of clothing onto the damp floor of the garage (T.204). Ingram, still wearing the sunglasses, again turned off the alarm, and appellant drove him to a deserted street and left him there with the truck (Ingram, U.89-90; Galvin, T.204-205, 227). Appellant and Galvin, who had followed in Crawford's car, went to a bar where they met Al Holmes, an acquaintance of appellant's. Holmes agreed to help them dispose of the garments, and appellant and Galvin returned to Crawford's house (T.205-206).

By this time, Crawford had learned of the crime, and was angry that Galvin and appellant had taken the risk of bringing the truck driver to his house. Crawford wanted nothing to do with the load, but allowed appellant and Galvin to use his

truck to remove the garments (Galvin, T.205-207; Crawford, U.27-28). Holmes arrived in time to assist them, and received four or five suits for his efforts (T.207-208). Appellant and Galvin drove around looking for a "fence." After failing to find any of the fences appellant knew, Galvin called one he had used before. He made the arrangements, delivered the goods (with appellant's help), and received \$5,000 in cash, which the two split equally (T.208-216).

While appellant and Galvin were trying to dispose of their portion of the merchandise, Ingram (who had called his employer shortly after appellant's departure) delivered the remainder of the garments to Gertz's Jamaica store (U.90-91). During June of 1975, Ingram selected appellant's picture from an array of seven photographs (U.92).^{*} After eliciting this fact at trial, the Government offered into evidence the seven photographs -- mug shots with exhibit stickers covering the numbers (T.88, U.94).

Counsel, who had not requested a Wade hearing, although he knew about the photographic identification^{**} prior to the commencement of trial (see T.13, 16), now asked for a voir dire (U.94). Counsel brought out the fact that Ingram had the opportunity to observe the armed robber for approximately three minutes (although he had not watched the entire time) (U.100).

^{*}Ingram later testified that the photographic identification occurred two months after the crime (U.135-136).

^{**}Counsel also knew that appellant had been in federal custody in the Eastern District at the time of the identification (T.14).

The attorney thereafter objected to the introduction of the photographs

... on the grounds that by the witness' own testimony he didn't have sufficient time to see the defendant. He has been vague as to seconds, minutes, and I believe this is one of the crucial points of the entire case.

(U.102).

C. Instructions* and Verdict

Following the Government's submission of written requests to charge, the court asked whether the defense attorney had any requests. Counsel asked for an instruction similar to the one given by Judge Costantino in appellant's other hijacking case (T.255-256). The defense was later given a copy of Judge Pratt's charge to review, and took no exception either before or after the charge was given (U.68, 205). The court gave no accomplice or immunized witness instructions, or any charge on identification testimony (Appendix C, U.182-205). The jury returned a verdict of guilty on both counts (U.214).

*The complete text of Judge Pratt's charge to the jurors is C to the separate appendix to appellant's brief.

D. The Sentencing

At sentencing, appellant moved to set aside the conviction on the ground that his lawyer had not submitted any motions, had not interviewed any witnesses, and had not conducted any investigation (S.3, 5). The court denied the motion,* as well as the request for an adjournment of sentencing and the appointment of new counsel (S.11-15).

The defense attorney, appearing over the protest of appellant (S.3-4), agreed with the Probation Department report's assessment of appellant, and expressed the opinion that appellant "has an exaggerated ego which I think gets him into trouble" (S.4). After defending his own conduct at trial (S.3-4, 17), the lawyer asked the court to impose a sentence concurrent with appellant's state sentence "because he's almost 40 and he would have some time left to see if he can straighten out his life" (S.17).** Finding that "there really is not too much that can

*The court attempted to defend the attorney's performance at trial:

THE COURT: ... [Counsel] performed effectively as an officer of the Court in not making frivolous motions.

THE DEFENDANT: He didn't make any motions, your Honor.

THE COURT: Yes, he did. He made a number of them.

THE DEFENDANT: I don't see any.

(S.12).

**The probation report reveals appellant's age as 31.

be said in connection with mitigation of penalty" (S.18), the court sentenced appellant to eight-year concurrent sentences on the two counts, to run consecutively to the 15-year state sentence appellant was then serving (S.19).

Taken aback by the length of the sentence, appellant asked whether the court had considered letters from two senior correctional officers and the warden of Metropolitan Correctional Center, as well as a report by the institution. Judge Pratt had seen the latter report, but not the three letters. Although appellant had given copies to his probation officer, the letters had not been attached to the probation report.* The court, recalling "some reference in substance to the tone of the memoranda" (S.21),** suggested that appellant make a motion for reduction of sentence with the letters attached as exhibits (S.21-22).

*The three letters are attached as Appendices D, E, and F, and the institutional report appears as Appendix G to the separate appendix to appellant's brief. The letters of Officers Mouzon and Coffee (Appendices D and E) were supplied by Probation Officer Thomas E. Yeager, and contain his initials and the notation, "Do not use, not signed by Warden."

**The court was apparently referring to the institutional report (Appendix G), which mentioned the incident in which appellant had saved the life of another inmate and dealt to a certain extent with his behavior at Metropolitan Correctional Center.

ARGUMENT

Point I

APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO MAKE PRE-TRIAL MOTIONS, TO REQUEST ACCOMPLICE AND IMMUNIZED WITNESS INSTRUCTIONS OR TO EXCEPT TO THEIR OMISION FROM THE CHARGE, TO OBJECT TO THE PROSECUTOR'S IMPROPER REMARK IN SUMMATION, OR TO ADVOCATE APPELLANT'S CAUSE AT THE SENTENCING.

Appellant had been satisfied with his attorney's performance in his previous case, but as the time for trial approached in the instant case and his lawyer did nothing, appellant desperately began to write his own pre-trial motions. He pleaded with the court to assign another attorney, and the lawyer, acknowledging an irreconcilable conflict with his client, asked for permission to withdraw from the case. The court refused to ascertain the validity of appellant's claim, despite the fact that the lawyer's incompetence was evident from the start of the proceedings. This lack of effective assistance of counsel was "of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice." Rickenbacker v. The Warden, Doc. No. 76-2036, slip op. 1063, 1069-1070 (2d Cir., December 22, 1976).

Counsel's omissions were not due to strategic choices, but to inadequate preparation or general confusion. This is evident from the fact that he did not move to dismiss the indictment be-

cause of the 3 1/2-year pre-indictment delay, but after appellant raised the issue, counsel acknowledged the merit of appellant's position. The attorney, rather tardily, joined in appellant's arguments that the prosecutorial delay had been intentional, but did not ask for a hearing either before trial or when Chester Crawford testified that the Government had informed him in 1973 or 1974 of its decision to prosecute the instant case (U.29-30). Counsel was apparently unaware that the Government's use of delay as an intentional device to gain a tactical advantage may, in itself, be sufficient to support a dismissal of the indictment. In United States v. Marion, 404 U.S. 307 (1971), the Supreme Court set out the factors of intentional delay and actual prejudice as grounds for dismissal of an accusatory instrument. This Circuit has not yet decided whether both elements in Marion are necessary to prove a due process violation arising from pre-indictment delay. See United States v. Vispi, 545 F.2d 328, 332 fn.4 (2d Cir. 1976). Thus, to adequately protect appellant's rights, counsel was obliged to pursue the issue. Moreover, even if both factors in Marion are eventually deemed necessary, counsel's failure to investigate the case or to contact appellant's proposed witnesses may have prevented him from showing any specific prejudice resulting from the delay.

Counsel's ineptitude is further manifested by his failure to request a Wade hearing to raise the propriety of the photographic identification by Ingram. Instead, he waited until

after proof of the identification had been brought out by the prosecution, and then conducted a voir dire in the presence of the jury to determine the admissibility of the mug shots. He then objected to the evidence on the ground that there was no independent source for the identification. Since the attorney conceded that identification was "one of the crucial points in the case" (U.102), he should have explored the issue at a pre-trial hearing.* As this Court has recognized, a suppression hearing "relieves defense counsel confronted with a conviction of having to decide the course of cross-examination without knowing whether this may hurt or help." United States ex rel. Phipps v. Follette, 428 F.2d 912, 913 n.1 (2d Cir.), cert. denied, 400 U.S. 908 (1970). Before the trial began, appellant brought to the court's attention the lawyer's failure to make any suppression motions, but Judge Pratt improperly refused to conduct a searching inquiry into the serious complaint. See United States v. Calabro, 467 F.2d 973, 986 (2d Cir. 1972); United States v. Morrissey, 461 F.2d 666, 669 (2d Cir. 1972). Since the court was aware of the photographic identification (T.13), Judge Pratt should have asked whether the attorney had determined that the array and the circumstances surrounding the showing of the photographs were not unnecessarily suggestive.

*He could also have questioned the use of a photographic array when appellant was in federal custody in the Eastern District of New York, and a line-up was therefore feasible.

This would also have been an opportune time for the court to inquire as to counsel's reasons for failing to raise the issue of pre-indictment delay.

Although the Government's case relied heavily upon Galvin and Crawford, counsel failed to request a charge on accomplice or immunized witnesses. He was unfamiliar with the longstanding law in this Circuit that the defense is entitled, upon request, to a charge that "accomplice testimony should be scrutinized with special care and caution." United States v. Abrams, 427 F.2d 86, 90 (2d Cir.), cert. denied, 400 U.S. 832 (1970); see United States v. Swiderski, 539 F.2d 854, 859-860 (2d Cir. 1976); United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933); see also United States v. Leonard, 494 F.2d 955, 961 (D.C. Cir. 1974) (the court committed reversible error by denying a requested instruction cautioning the jury about the testimony of immunized witnesses). Counsel's failure to perceive the absence of an accomplice charge is especially inexcusable here, for Judge Pratt gave him a copy of his instructions prior to delivery.* The lawyer's vague request for a charge similar to the one given by Judge Costantino in appellant's unrelated hijacking case is indicative of his faint-hearted performance throughout.

*Counsel also failed to take exception to the instruction that "the defendant has the power to subpoena in support of his position if he so chooses, and he may exercise that power, if he chooses" (U.188). This charge improperly called attention to appellant's failure to produce witnesses, and suggested that there was an insidious reason for his decision not to subpoena anyone.

Counsel again erred in failing to object to the prosecutor's remark in summation, "[t]here is no motive of these two men [Galvin and Crawford] to lie" (U.158). Not only did this statement violate the rule "that a prosecutor should not bolster the Government's case by placing the prestige of the United States Government behind the witness for the prosecution" (United States v. LaSorsa, 480 F.2d 522, 526 (2d Cir. 1973)), but it flagrantly contradicted the record. The testimony of the two men reveals an abundance of reasons to falsify their accounts. Both admitted their guilt of a number of hijackings and other crimes for which they had not been indicted. Galvin was vulnerable because of his probationary status, and he acknowledged that his probation officer was aware of his testimony in the instant case. Crawford was under even greater pressure from the prosecution; he had served 3 1/2 years on his concurrent murder and hijacking convictions and, with the promise of assistance from the office of the United States Attorney, was no doubt hoping for an early parole. Moreover, if Crawford refused to testify against appellant, the Government could terminate his (and his family's) membership in the witness protection program. Thus, the defense attorney should not have permitted the remark to pass without an immediate objection.

At the critical stage of sentencing, counsel failed in the task of "marshalling the facts, introducing evidence of mitigating circumstances, and, in general, aiding and assisting the

defendant to present his case...." Mempa v. Rhay, 389 U.S. 128, 135 (1967). He did not correct the omissions or fundamental unfairness of the probation report (see Point II, infra), but instead accepted its unfavorable judgment of appellant. The only fact counsel managed to marshal -- that appellant was approaching 40 -- was completely mistaken. The attorney also failed to move for a vacature of the sentence when appellant raised the issue of the missing sentencing letters.

Counsel's lack of preparation and ineptitude were apparent from the outset of the proceedings until the sentencing, and made the trial "a farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). However, as has been suggested by Judge Smith in Rickenbacker v. The Warden, supra, slip op. at 1071, the time may have come for a reconsideration of the "farce and mockery" standard, which has been rejected by six other circuits. See Rickenbacker, supra, slip op. at 1074 (Oakes, J., dissenting).

In United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973), the court held that the Sixth Amendment entitles a defendant to "the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate." Under that standard, counsel is required to

... conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are

raised" so that the Government is put to its proof.

Id., 487 F.2d at 1204.

Clearly, counsel's failure to raise the Marion issue or to request a Wade hearing contravened this standard. The attorney would similarly be deemed ineffective under the standards in effect in the Fifth and Sixth Circuits: is he reasonably likely to and is he rendering reasonably effective assistance. See United States v. Fessel, 531 F.2d 1275, 1278 (5th Cir. 1976); United States v. Toney, 527 F.2d 716, 720 (6th Cir. 1975). Nor did the attorney exercise the customary skill and knowledge which normally prevail. See Moore v. United States, 432 F.2d 730, 736 (3d Cir. en banc 1970).

If this Court finds that counsel's performance did not constitute a "farce and mockery of justice," it should follow the suggestion of Judge Oakes to "declare [that standard] a dead letter, bringing the law of our own circuit into line with the rule of United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973)...." Rickenbacker, supra, slip op. at 1076 (dissenting opinion). The conviction must therefore be reversed and the matter remanded for a new trial.

Point II

THE IMPAIRMENT OF APPELLANT'S RIGHT TO
PRESENT INFORMATION IN MITIGATION OF
PUNISHMENT REQUIRES VACATURE OF THE
SENTENCE AND A NEW SENTENCING PROCEDURE.

Immediately after the imposition of sentence, appellant learned that the three letters he had given his probation officer to forward to the court and to incorporate into the pre-sentence report had never been seen by Judge Pratt. Without informing appellant, the probation officer had removed the letters from appellant's file. Further, the probation officer had made no reference to the letters in the pre-sentence report because they were not signed by the warden of the Metropolitan Correctional Center.* Thus, appellant was effectively deprived of his right to present critical documents dealing with his rehabilitative progress at MCC. This error requires a vacature of the eight-year sentence and a re-sentencing before a different judge.

Rule 32(a) of the Federal Rules of Criminal Procedure not only gives a defendant the right to make a statement in his own behalf, but also "to present any information in mitigation of punishment." United States v. Rosner, 485 F.2d 1213, 1230 (2d

*As the notation on the letters reveals, they were not submitted to the court by the probation officer because they were not signed by the warden. For some reason, Mr. Yeager also failed to send Judge Pratt the letter written (and signed) by Warden Taylor (Appendix F).

Cir. 1973), cert. denied without prejudice, 417 U.S. 950 (1974), citing Green v. United States, 365 U.S. 301, 304 (1961). Correlatively, the court is obligated to give such information serious consideration. United States v. Malcolm, 432 F.2d 809, 817 (2d Cir. 1970). "Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing" has been held to render the entire sentencing procedure invalid as a violation of due process. Townsend v. Burke, 334 U.S. 736, 740-741 (1948); United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976).

The information kept from the court by the probation officer's action was "highly material to mitigation of punishment." United States v. Malcolm, supra, 432 F.2d at 817. The letters of senior officers Mouzon and Coffee (Appendices D and E, respectively) were based upon their observations of appellant over an 18-month period. The first letter recounts an incident in which appellant rendered life-saving assistance by helping the officer to stop one inmate from repeatedly stabbing another inmate.* Officer Mouzon also notes that appellant "has been instrumental in motivating many of the other residents as

*The incident is mentioned in Warden Taylor's letter (Appendix F) and in the institutional report (Appendix G). Although the latter report was sent to Judge Pratt, the document merely states that appellant had saved a life, without the significant fact that he had done so at the risk of injury to himself.

far as working and participating in various education and rehabilitation programs ... in the Unit that he has been housed." Mr. Mouzon concludes his letter with the belief that appellant "has good potential of becoming a real asset to society and his family upon release."

In a similar vein, Senior Officer Specialist Coffee commends appellant not only for his "superb work performance," but for "the conscientious manner and spirit of involvement that he consistently display[s] with regularity toward self-improvement." After noting appellant's efforts at encouraging better relations among inmates and staff, the officer expresses the opinion that appellant "will live up [to] the normal expectations of society once he is returned to the community, which should be at the most expeditious opportunity."

The officers' evaluations of appellant's prospects upon release sharply contradicted those in the probation report, which (after a fleeting reference to appellant's "good adjustment" while incarcerated) concluded that "this does not carry over into his contacts with society as evidenced by his frequent arrests" and predicted "that he is headed for further legal difficulties" (report dated December 6, 1976, at 18). Instead of utilizing the recent observations of appellant's behavior, the probation report stresses the negative opinion of government agents, which was based upon appellant's behavior prior to March 1973* (report at 5, 6, 18). The information in

*Appellant has been continuously incarcerated since that time.

the letters of Officers Mouzon and Coffee was also lacking in the institutional report (Appendix G) which was submitted to Judge Pratt. This report gives as much emphasis to appellant's earlier disruptive conduct at MCC as to his later efforts toward improving himself and others. Moreover, the warden's report is merely a compilation of facts about appellant's performance at the institution. It contains no first-hand judgment of appellant's "very good individual qualities" (Appendix D) or "overall personality" (Appendix E) based on 1 1/2 years' experience with him. Unlike the letters of the two officers, the warden's report provides no subjective evaluation of appellant's chances of becoming a productive member of society upon release. Therefore, the letters appellant submitted to the court after the pronouncement of sentence showed "a significant step toward rehabilitation" (United States v. Malcolm, supra, 432 F.2d at 817), and appellant was severely prejudiced by his inability to bring them to the court's attention.

Although doubtless well-intentioned, the court's offer to consider a Rule 35 motion is an inadequate remedy. Because of the "recognized difficulty which an original sentencing judge may have in rejecting or modifying prior conclusions and the necessity of maintaining the appearance of justice" (United States v. Stein, Doc. No. 76-1299, slip op. 211, 227 (2d Cir., October 22, 1976)), the sentence should be vacated and a re-sentencing should be conducted by a different judge.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the matter remanded for a new trial; alternatively, appellant should be re-sentenced before a different judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

April 18, 1977

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Barry J. Bassis